

Tatyana Evgenievna Drevaeva
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 San Francisco, CA, 94121
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 Plaintiff in Pro Per

THE UNITED STATES DISTRICT COURT
 FOR NORTHERN CALIFORNIA

	)	Case No. 3:18-cv-03748-JCS
Tatyana E. Drevaeva)	
<i>Plaintiff,</i>	)	Notice of Motion; Second Motion to
vs.	)	Strike Defendants' June 04, 2021 Answer
1) The U.S. Department of Veterans Affairs	)	to My Original June 25, 2018 Complaint
2) Mr. Denis Richard McDonough in his capacity as a Secretary of the U.S. Department of Veterans Affairs	)	in Its Entirety or Partially,
810 Vermont Avenue, NW, Washington, D.C. 20420	)	F.R.C.P. Rule 12(f);
<i>Defendant</i>	)	Memorandum of Points and Authorities;
Facility:	)	Declaration; Proposed Order.
New Mexico VA Healthcare System	)	Date: July 30, 2021
1501 San Pedro Drive, S.E.	)	Time: 09:30 AM
Albuquerque, NM, 87108	)	Location: Courtroom F – 15th Floor
	)	450 Golden Gate Avenue,
	)	San Francisco, CA 94102
	)	Judge: The Hon. Chief Magistrate
	)	Judge Joseph C. Spero

1 TO THE HONORABLE COURT, ALL PARTIES, AND COUNSEL ON RECORD.

2 NOTICE IS HEREBY GIVEN that on 07/30/2021 at 09:30 AM or as soon thereafter as
3 the matter may be heard in Courtroom F at the 15th Floor of the District Court for Northern
4 California located at 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff Pro Se
5 Tatyana Drevaleva will move the Court the second time for an Order that strikes Defendants'
6 June 04, 2021 Answer to my Original June 25, 2018 Complaint.in its entirety. I am making this
7 Motion pursuant to the F.R.C.P, Rule 12(f.)

8 As an alternative, I am asking the District Court to strike parts of Defendants' June 04,
9 2021 Answer pursuant to the F.R.C.P, Rule 12(f.)

10 Said the Second Motion to Strike shall be based on this Notice, the attached Second
11 Motion to Strike Defendants' June 04, 2021 Answer to my Original June 25, 2018 Complaint in
12 its entirety pursuant to the F.R.C.P, Rule 12(f), or, as an alternative, to strike parts of
13 Defendants' June 04, 2021 Answer, the attached Memorandum of Points and Authorities, the
14 attached Declaration, the pleadings and papers on file, and on such additional matters as may be
15 presented to the Court prior to or at the hearing.

16
17
18 Dated: June 19, 2021

Signed: Tatyana Drevaleva



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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2

3 **Objection No. 16.** 5:14-6:4. Read my June 25, 2018 Complaint, “On May 17, 2017, I

4 worked a night shift together with my co-worker Mrs. Nadya Das who is a Russian speaking

5 lady and a Monitor Technician at 5D. I said to Nadya about my plan to go to Russia to perform

6 an IVF procedure. On that night, Ms. Dunkelberger was absent. I was told that she would be

7 absent for two weeks, and she would return back to work only at the end of May 2017. I spoke to

8 Assistant Manager Mrs. Phil Johnson on that night. I said to him that I had spoken to Ms.

9 Dunkelberger about my plan to go to Russia for an IVF procedure, and I told Mr. Johnson

10 exactly the same things that I had told Ms. Dunkelberger (that I was 50 yo, that I didn’t have

11 children, that I performed approximately 8 IUI procedures with donor’s sperm, that I spent 2.5

12 years in Russia for my medical examination and treatment, that I underwent multiple

13 gynecological surgeries, that I performed 3 attempts of IVF, that I had an embryo that is frozen

14 in Russia, that I had a right for a free of charge IVF attempt in Russia, that I had only three pills

15 of Jeanine left, that I couldn’t refill these pills in the United States, I needed to go to Russia to

16 perform a free IVF attempt, I couldn’t pay \$15 thousand U.S. dollars for one IVF attempt in the

17 United States, I requested documentation from my Russian OB/GYN that I am in Registry of the

18 Ministry of Health of the Novosibirsk Region of Russia for a free IVF attempt, that I didn’t have

19 time to get this document translated in the United States but I will translate it in Russia and email

20 it to Ms. Dunkelberger and Mr. Johnson. Also, I gave my verbal consent that I allow Mrs. Nadya

21 Das to preliminary translate this document before I have a chance to officially translate it in

22 Russia.”

23 Read Zack’s June 04, 2021 Answer, page 4, lines 16-22, “Defendants admit that Plaintiff

24 worked **from 11:30 p.m. on May 17, 2017, to 8 a.m.** on May 18, 2017. Defendants admit that

25 Plaintiff worked with Ms. Das that night and told Ms. Das about her plans to go to Russia the

26 next day for a medical reason. Defendants admit that Ms. Dunkelberger was absent that night.

27 Defendants admit that Plaintiff spoke with Mr. Johnson that night about her plans to return to

28 Russia the next day for medication and in vitro fertilization. Defendants are without sufficient

knowledge to admit or deny the remaining factual allegations in this paragraph, including the details of the conversation with Mr. Johnson and, on that basis, deny those allegations.”

My objection.

1) I am respectfully asking the Court to strike Defendants’ libelous assertion that I worked **for eight hour shifts** and that, see page 4, lines 16-17, I worked **“from 11:30 p.m. on May 17, 2017, to 8 a.m. on May 18, 2017.”** In fact, I worked **for twelve hour shifts**, and I worked from May 17, 2017 from approximately 19:00 PM to May 18, 2017 to approximately 07.30 AM. Please, notice that the New Mexico VA Health Care System never paid overtime compensation for working in excess of eight hours per day. Therefore, I am respectfully asking the court to strike Defendants’ frivolous assertion that I worked “from 11:30 p.m. on May 17, 2017, to 8 a.m. on May 18, 2017.”

2) I am respectfully asking the Court to strike Defendants’ sentence, page 4, lines 20-22, “Defendants are without sufficient knowledge to admit or deny the remaining factual allegations in this paragraph, including the details of the conversation with Mr. Johnson and, on that basis, deny those allegations” for the following reasons:

- a) It is undisputed that Ms. Das was my Russian speaking co-worker
- b) It is undisputed that Ms. Das was appointed as a Monitor Technician at 5D, or, to be precise, as a Medical Instrument Technician, see (ER 03748 Vol. 1, page 275)

From: Dunkelberger, Carla

Sent: Monday, November 20, 2017 10:43 AM

To: Shafer, Amy V. <Amy.Shafer@va.gov>

Cc: Rincon, Donald M. <Donald.Rincon@va.gov>; Dunkelberger, Carla <Carla.Dunkelberger@va.gov>; Salazar-Ruiz, Andrew V. <Andrew.Salazar-Ruiz@va.gov>; Bonin, Allean R. <AlleanRanetta.Bonin@va.gov>

Subject: RE: Request for documents

1. Organizational chart – see attached
2. Breakdown of organizational unit for position in question (Medical Instrument Technician). EEO categories unknown.
 - a. Tatyana Drevalova, Medical Instrument Technician, GS-649-07, full time.
 - b. Nadzeya Das, Medical Instrument Technician. GS-0649-06, full time.
 - c. David Williams, Medical Instrument Technician. GS-0649-06, full time.
 - d. David Trujillo, Medical Instrument Technician, GS-0649-05, full time
 - e. Vacant Position, Medical Instrument Technician, GS-0649, full time.

- 3) I am respectfully asking the Court to strike Zack's statement, page 4, lines 17-18, "Defendants admit that Plaintiff worked with Ms. Das that night and told Ms. Das about her plans to go to Russia the next day **for a medical reason**" because I declare under the penalty of perjury and under the Federal laws that on May 17, 2017 I said to Ms. Das about my plans to go to Russia **to refill a prescription of my hormonal pills and to perform an In-Vitro Fertilization procedure.**
- 4) I declare under the penalty of perjury and under the Federal laws that on May 17, 2017 Mr. Phil Johnson told me that Ms. Dunkelberger was out of her office, and that she would be back to her office **only in two weeks** that was approximately the end of May 2017.
- 5) I am respectfully asking the Court to strike Defendants' sentence, page 4, lines 19-22, "Defendants admit that Plaintiff spoke with Mr. Johnson that night **about her plans to return to Russia the next day for medication and in vitro fertilization.** Defendants **are without sufficient knowledge** to admit or deny the remaining factual allegations in this paragraph, including the details of the conversation with Mr. Johnson and, on that basis, deny those allegations" for the following reasons:
- a) Because I can demonstrate by the preponderance of the evidence that I said to Mr. Johnson about all of the following, see Mr. Johnson's EEO Interrogatory (**ER 03748 Vol. 1, 218-219**):
- (i) That I had **"one pill left"**¹
 - (ii) That I was flying to Russia next day
 - (iii) That I was flying to Russia to get In-Vitro Fertilization done
 - (iv) That I was 50 yo
 - (v) That I always wanted to have children
 - (vi) That "it could be [my] last chance"
 - (vii) That on May 17, 2017 Mr. Johnson gave me an OPM 71 form

¹ Mr. Johnson erred. On May 17, 2017, I had three pills left.

- (viii) That on May 17, 2017 Mr. Johnson asked me to fill out this form
- (ix) That on May 17, 2017 Mr. Johnson asked me to provide my medical documentation
- (x) That on May 17, 2017 Mr. Johnson **didn't** say that the medical documentation should be on English language
- (xi) That on May 17, 2017 Mr. Johnson **didn't** say that the medical documentation on English language should be submitted **prior to approval** of the leave of absence
- (xii) That on May 17, 2017 Mr. Johnson said that he could not approve my request for a Leave Without Pay
- (xiii) That on May 17, 2017 Mr. Johnson said that he would turn the [medical] documentation
- (xiv) That on May 17, 2017 Mr. Johnson said that, if this was that important, I should go.

Read Mr. Johnson's EEO Interrogatory (**ER 03748 Vol. 1, 218-219**), "The complainant came into the office, after business hours, on May 17, 2017 stating **s/he had one pill left** and **was flying to Russia the next day** to have Invitro Fertilization done. The complainant also stated his/her age to be 50 and that s/he had always wanted to have children and "this may be my last chance." I handed the complainant the OPM71 paper work and stated that this must be filled out and supporting documentation in English from the doctor must also be supplied. At this time I stated to the complainant that I could not approve Leave Without Pay but I would turn in the documentation **and if this was that important then s/he should go.**"

Also, I declare under the penalty of perjury and under the Federal laws that on May 17, 2017, I said to Mr. Johnson:

- 1) that I had spoken to Ms. Dunkelberger about my plan to go to Russia for an IVF procedure
- 2) that I told Mr. Johnson exactly the same things that I had told Ms. Dunkelberger:
 - (i) that I was 50 yo

- (ii) that I didn't have children
 - (iii)that I performed approximately 8 IUI procedures with donor's sperm
 - (iv)that I spent 2.5 years in Russia for my medical examination and treatment
 - (v) that I underwent multiple gynecological surgeries
 - (vi)that I performed 3 attempts of IVF
 - (vii) that I had an embryo that is frozen in Russia
 - (viii) that I had a right for a free of charge IVF attempt in Russia
 - (ix)that I had only three pills of Jeanine left
 - (x) that I couldn't refill these pills in the United States
 - (xi)that I needed to go to Russia to perform a free IVF attempt
 - (xii) that I couldn't pay \$15 thousand U.S. dollars for one IVF attempt in the United States
 - (xiii) that I requested documentation from my Russian OB/GYN
 - (xiv) that I am in Registry of the Ministry of Health of the Novosibirsk Region of Russia for a free IVF attempt
- 3) that I didn't have time to get this document translated in the United States but I will translate it in Russia and email it to Ms. Dunkelberger and Mr. Johnson
- 4) Also, I gave my verbal consent that I allow Mrs. Nadya Das to preliminary translate this document before I have a chance to officially translate it in Russia.

Read (ER 03748 Vol. 1, 218-219),

and the circumstances surrounding this event? The complaintant came into the office, after business hours, on May 17, 2017 stating s/he had one pill left and was flying to Russia the next day to have Invitro Fertilization done. The complaintant also stated his/her age to be 50 and that s/he had always wanted to have children and "this may be my last chance". I handed the complaintant the OPM71 paper

work and stated that this must be filled out and supporting documentation in English from the doctor must also be supplied. At this time I stated to the complaintant that I could not approve Leave Without Pay but I would turn in the documentation and if this was that important then s/he should go.

Objection No. 17. 6:5-10. Read my June 25, 2018 Complaint, “Because on that night Ms. Dunkelberger was absent, I asked Mr. Johnson’s permission to go to Russia for the mentioned above purposes. The exact words of Mr. Johnson were, “If you need to go – go!” Therefore, he verbally allowed me to go to Russia. He gave me a form to fill out and request a LWOP. I filled this form out, and I requested a LWOP from May 18, 2017 to July 07, 2017. Unfortunately, I don’t have a copy of that form. I put the completed form under the door of Mr. Johnson’s office.”

Read Zack’s Answer, from page 4, line 23 to page 5, line 4, “Defendants admit that Plaintiff asked Mr. Johnson’s permission to go to Russia. Defendants deny that Plaintiff was given verbal permission to go to Russia or take two or more weeks of leave and that any leave was approved. Defendants admit that Plaintiff completed a form requesting leave without pay from May 18, 2017, to July 7, 2017, and slid the form under Mr. Johnson’s door. Defendants aver that Plaintiff submitted no medical documentation with the form and that the request was not approved prior to Plaintiff’s departure for Russia. Defendants respectfully refer the Court to the document for a full and accurate statement of its contents. To the extent that Plaintiff’s characterization of the content of this document is inconsistent with the text of the document, Defendants deny the allegations. Defendants are without sufficient knowledge to admit or deny the remaining factual allegations in this paragraph and, on that basis, deny those allegations.”

My objection.

I am respectfully asking the Court to strike Zack’s statement, page 4, line 23, “Defendants admit that Plaintiff asked Mr. Johnson’s permission to go to Russia” because this statement is incomplete. The correct statement is, see my Complaint, page 6, lines 5-6, “**Because on that night Ms. Dunkelberger was absent,** I asked Mr. Johnson’s permission to go to Russia **for the mentioned above purposes.**” Therefore, Zack failed to specify that:

- 1) On May 17, 2017 I asked Mr. Johnson to allow me to go to Russia because on that night Ms. Dunkelberger was out of her office
- 2) On May 17, 2017 I asked Mr. Johnson to allow me to go to Russia for the following purposes:

- a) To refill a prescription of my hormonal pills because I had only three pills left, and I couldn't obtain the pills in the United States
- b) To perform an In-Vitro Fertilization procedure.

I am respectfully asking the Court to strike Zack's sentence, page 4, line 24-25, "Defendants deny that Plaintiff was given verbal permission to go to Russia or **take two** or more weeks of leave and that any leave was approved" for the following reasons:

- 1) Because I **didn't** say to Mr. Johnson that I would take **two** weeks off. I specifically said to Mr. Johnson that I would take six weeks.
- 2) On May 17, 2017, Mr. Johnson verbally approved my request for a leave. Read Mr. Johnson's EEO Interrogatory (ER 03748 Vol. 1, 219), "**and if this was that important then s/he should go.**"

English from the doctor must also be supplied. At this time I stated to the complainant that I could not approve Leave Without Pay but I would turn in the documentation and if this was that important then s/he should go.

I am respectfully asking the Court to strike Zack's phrase, page 4, lines 25-26, "Defendants admit that Plaintiff completed a form requesting leave without pay from May 18, 2017, to July 7, 2017, and slid the form under **Mr. Johnson's** door" for the following reasons:

- 1) Because Zack failed to specify that it was an OPM 71 form
- 2) Because Zack failed to specify that:
 - a) on May 17, 2017 **Mr. Johnson** gave me this form OPM 71, and
 - b) **he asked me** to fill it out, and
 - c) **he specifically asked me to request a Leave Without Pay**, and
 - d) **he never asked me to request any form of a paid leave of absence**
- 3) Because it the door was not "**Mr. Johnson's**" door. It was the door of the Manager's office (Manager Ms. Dunkelberger and Assistant Manager Mr. Johnson.)

I am respectfully asking the Court to strike Zack's sentence, page 4, line 27, "Defendants aver that Plaintiff submitted no medical documentation with the form...."

I admit that I didn't submit any medical documentation with the form. Actually, **I was not required to submit any medical documentation** in support to my Request for a Leave Without Pay. See *JOSEPH L. BURNS v. KIRSTJEN NIELSEN, Secretary, U.S. Department of Homeland Security*, EP-17-CV-00264-DCG, UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS EL PASO DIVISION (January 28, 2020) (Doc. No. 310, February 14, 2021) (Exhibit 327),

"A. Improper medical Inquiry Claim

The RA incorporates by reference many of the prohibitions on employment discrimination of Title I of the Americans with Disabilities Act ("ADA"), including [42 U.S.C.] § **12112(d)(4)(A)'s medical inquiry prohibition**. *Taylor v. City of Shreveport*, 798 F.3d 276,283 (5th Cir. 2015). Section 12112(d)(4)(A) provides:

A covered entity **shall not** require a medical examination and **shall not** make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

A plaintiff, however, need not establish that he has a disability to prevail on a claim for an improper medical inquiry under this ADA provision. *Taylor*, 798 F.3d at 284; see also *Williams v. FedEx Corp. Servs*, 849 F.3d 889, 901 (10th Cir. 2017) ("The provision applies to **all** employees, and **a plaintiff need not prove that he is disabled**.").

Before addressing the merits of Burns's medical inquiry claim, the Court addresses two procedural matters. The magistrate judge found that (a) Burns's Complaint alleged a claim for improper medical inquiry, *id* at 25, and (b) Burns exhausted his administrative remedies on his medical inquiry claim, R&R at 24. The Secretary objects to these findings. Def. 's Objs. to R&R at 16. Below, the Court addresses each in turn."

"... an improper medical examination or inquiry "may constitute a form of employment discrimination under the ADA." *Taylor*, 798 F.3d at 282 (citing § 12112(d)(1)); see also

1 **Fredenburg v. Contra Costa Cty. Dept. of Health Servs., 172 F.3d 1176, 1181 (9th Cir. 1999)**

2 ("Subsection (d)(1) provides a general prohibition against using medical examinations to
3 discriminate; subsections (d)(2) through (d)(4) provide more detailed guidelines as to what is and
4 is not allowed."); *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1213 (11th Cir.
5 2010) ("[O]ne way a disabled plaintiff could meet his prima facie case of discrimination [under §
6 12112(d)(1)] would be by showing that his employer discriminated against him by ... making
7 **a[n] ... improper medical inquiry in violation of subsection (d)[,]**" which includes, among
8 others, § **12112(d)(4)(A).**)

9
10 Therefore, an employer may be liable for making medical inquiries directed at its
11 employees under either § 12112(d)(4)(A) or § 12112(d)(1). Whereas § 12112(d)(4)(A) does not
12 require plaintiff to assert that he "has a disability to contest an allegedly improper medical
13 inquiry or medical examination," *Taylor*, 198 F.3d at 284, § 12112(d)(1) does, *Harrison*, 593
14 F.3d at 1213 ("[B]ecause § 12112(d)(1) expressly incorporates § 12112(a)'s prohibition of
15 discrimination against 'qualified individuals [on the basis of] disabilit[y],' ... to maintain an action
16 for discrimination itself, a plaintiff must be disabled under the ADA.".)"

17
18 I am repeating that, despite I didn't submit my medical documentation with my form
19 OPM 71 on May 17, 2017, I notified Mr. Johnson that:

- 20 1) I would receive this medical documentation within the next few hours,
- 21 2) that this documentation would be on Russian language,
- 22 3) that I would not be able to translate this documentation into English **using a certified**
23 **translator** prior to my departure to Russia on May 18, 2017
- 24 4) that Ms. Dunkelberger specifically told me that I didn't have a right to translate my
25 medical documentation into English myself
- 26 5) that Ms. Dunkelberger specifically told me that only a certified translator had a right
27 to translate my medical documentation from Russian into English
- 28 6) that I had three pills left, and that I needed to take the pills during my trip to Russia

1 7) that I would leave to Russia on May 18, 2017 because I have three pills left and
2 because I can't afford to miss a pill, and because I can't obtain these pills in the
3 United States

4 8) that I would email my medical documentation on Russian language as soon as I
5 receive it within the next few hours

6 9) that, as soon as I arrive at Russia, I would find a certified translator, I would translate
7 my medical documentation into English, and I would email my medical
8 documentation on English language to both Ms. Dunkelberger and Mr. Johnson

9 10) that, until I find a certified translator in Russia, and until I email my medical
10 documentation on English language to both Ms. Dunkelberger and Mr. Johnson, I
11 authorized my Russian speaking co-worker Ms. Nadya Das to translate this medical
12 documentation for both Ms. Dunkelberger and Mr. Johnson.

13
14 I am respectfully asking the Court to strike Zack's sentence, page 4, lines 27-28,
15 "Defendants aver that ... the request was not approved prior to Plaintiff's departure for Russia."

16 I am repeating Mr. Johnson's EEO Interrogatory (ER 03748 Vol. 1, 219), "and if this
17 was that important then s/he should go."

18 *English from the doctor must also be supplied. At this time I stated to the*
19 *complainant that I could not approve Leave Without Pay but I would turn in the*
documentation and if this was that important then s/he should go.

20 Also, see the November 18, 2020 Memorandum of the 9th Circuit in Appeal No. 19-
21 16395, page 4, "Drevaleva alleged that she was denied leave for her alleged disability and
22 terminated even though she made a proper request that was approved by her supervisor."

23 Please, notice that Defendants didn't file any Petition for Rehearing and didn't attempt to reverse
24 the 9th Circuit's ruling that I had left my job with a permission of my Supervisor.

25 Therefore, because Defendants didn't attempt to reverse the ruling of the 9th Circuit,
26 Defendants are not eligible to re-assert that I had left my job without permission.

27 I am respectfully asking the Court to take a Judicial Notice of my May 18, 2017 Request
28 for Leave Without Pay (ER 03748 Vol. 1, page 287.)

02 6/28/17

Request for Leave or Approved Absence

1. Name (Last, first, middle) <i>Drevalera Tatyana E</i>		2. Employee or Social Security Number (Enter only the last 4 digits of the Social Security Number (SSN)) [REDACTED]	
3. Organization <i>Albuquerque VAMC, 5D</i>			
4. Type of Leave/Absence (Check appropriate box(es) below)	Date From To	Time From To	Total Hours
<input type="checkbox"/> Accrued Annual Leave			
<input type="checkbox"/> Restored Annual Leave			
<input type="checkbox"/> Advanced Annual Leave			
<input type="checkbox"/> Accrued Sick Leave			
<input type="checkbox"/> Advanced Sick Leave			
Purpose: <input type="checkbox"/> Illness/injury/incapacitation of requesting employee <input type="checkbox"/> Medical/dental/optical examination of requesting employee <input type="checkbox"/> Care of family member, including medical/dental/optical examination of family member, or bereavement <input type="checkbox"/> Care of family member with a serious health condition <input type="checkbox"/> Other		5. Family and Medical Leave If annual leave, sick leave, or leave without pay will be used under the Family and Medical Leave Act of 1993, please provide the following information: <input type="checkbox"/> I hereby invoke my entitlement to Family and Medical Leave for: <input type="checkbox"/> Birth/Adoption/Foster Care <input type="checkbox"/> Serious health condition of spouse, son, daughter, or parent <input type="checkbox"/> Serious health condition of self Contact your supervisor and/or your personnel office to obtain additional information about your entitlements and responsibilities under the Family and Medical Leave Act. Medical certification of a serious health condition may be required by your agency.	
<input type="checkbox"/> Compensatory Time Off			
<input type="checkbox"/> Other Paid Absence (Specify in Remarks)			
<input checked="" type="checkbox"/> Leave Without Pay	<i>05.18.17-07.07.17</i>		
6. Remarks: <i>To solve my health issues in Russia.</i>			
7. Certification: I hereby request leave/approved absence from duty as indicated above and certify that such leave/absence is requested for the purpose(s) indicated. I understand that I must comply with my employing agency's procedures for requesting leave/approved absence (and provide additional documentation, including medical certification, if required) and that falsification on this form may be grounds for disciplinary action, including removal.			
7a. Employee Signature <i>Tatyana Drevalera</i>		7b. Date <i>05.17.2017</i>	
8a. Official Action on Request: <input type="checkbox"/> Approved <input checked="" type="checkbox"/> Disapproved		(If disapproved, give reason. If annual leave, initiate action to reschedule.)	
8b. Reason for Disapproval:			
8c. Supervisor Signature <i>Ma R Price DMS, RN</i>		8d. Date <i>5-19-2017</i>	

PRIVACY ACT STATEMENT
Section 6311 of Title 5, United States Code, authorizes collection of this information. The primary use of this information is by management and your payroll office to approve and record your use of leave. Additional disclosures of the information may be: to the Department of Labor when processing a claim for compensation carriers regarding a job connected injury or illness; to a State unemployment compensation office regarding a claim; to Federal Life Insurance or Health Benefits carriers regarding a claim; to a Federal, State, or local law enforcement agency when your agency becomes aware of a violation or possible violation of civil or criminal law; to a Federal agency when conducting an investigation for employment or security reasons; to the Office of Personnel Management or the General Accounting Office when the information is required for evaluation of leave administration; or the General Services Administration in connection with its responsibilities for records management.

Public Law 104-134 (April 26, 1996) requires that any person doing business with the Federal Government furnish a social security number or tax identification number. This is an amendment to Title 31, Section 7701. Furnishing the social security number, as well as other data, is voluntary, but failure to do so may delay or prevent action on the application. If your agency uses the information furnished on this form for purposes other than those indicated above, it may provide you with an additional statement reflecting those purposes.

Office of Personnel Management
5 CFR 630

Local Reproduction Authorized

Print Form

Clear Form

OPM Form 71
Rev. September 2009
Formerly Standard Form (SF) 71
Previous editions usable

000168

Please, notice the following facts:

- 1) I submitted my Request for a Leave Without Pay on the form OPM 71
- 2) I submitted my Request for a Leave Without Pay on May 17, 2017
- 3) The OPM 7 form contained a variety of paid leave options:

4. Type of Leave/Absence (Check appropriate box(es) below)	Date		Time		
	From	To	From	To	
<input type="checkbox"/> Accrued Annual Leave					
<input type="checkbox"/> Restored Annual Leave					
<input type="checkbox"/> Advanced Annual Leave					
<input type="checkbox"/> Accrued Sick Leave					
<input type="checkbox"/> Advanced Sick Leave					
Purpose: <input type="checkbox"/> Illness/injury/incapacitation of requesting employee <input type="checkbox"/> Medical/dental/optical examination of requesting employee <input type="checkbox"/> Care of family member, including medical/dental/optical examination of family member, or bereavement. <input type="checkbox"/> Care of family member with a serious health condition <input type="checkbox"/> Other					
<input type="checkbox"/> Compensatory Time Off					
<input type="checkbox"/> Other Paid Absence (Specify in Remarks)					

- 1) Accrued Annual Leave
 - 2) Restored Annual Leave
 - 3) Advanced Annual Leave
 - 4) Accrued Sick Leave
 - 5) Advanced Sick Leave:
- Purpose:
- a) Illness/Injury/Incapacitation of requesting employee
 - b) Medical/Dental/Optical examination of requesting employee
 - c) Care of family member, including medical/dental/optical examination of family member, or bereavement

- d) Care of family member with a serious health condition
- e) Other
- 6) Compensatory Time Off
- 7) Other Paid Absence.

Please, take a judicial notice of a material fact of the case that, despite I was **a full time** appointee (**ER 03748 Vol. 2, page 502**), and despite I was eligible for an Advanced Annual Leave and for an Advance Sick Leave, and despite these leave options were listed in the OPM 71 form, both Ms. Dunkelberger and Mr. Johnson never asked me to request an Advanced Annual Leave and/or an Advance Sick Leave, and both Ms. Dunkelberger and Mr. Johnson specifically stated that my only option was a Leave Without Pay (a LWOP.)

Please, also notice the AFGE Master Agreement, Article 35, Section 16 - Family and Medical Leave Act (FMLA) (**ER 03748 Vol. 3, page 870**),

A. “Maternity and Paternity Leave

1. **Under FMLA and this Agreement**, bargaining unit employees are entitled to 16 weeks of LWOP during any 12 month period for the following reasons:
 - a. Birth of a son or daughter and the care of such son or daughter; and,
 - b. Placement of a son or daughter for adoption or foster care.
2. Supervisors are encouraged to approve additional leave as circumstances warrant.

B. **Other family medical leave under FMLA and this Agreement**, bargaining unit employees are entitled to 12 weeks of LWOP during any 12 month period for one or more of the following reasons:

1. The care of a family member of the employee with a serious health condition. Family member is defined as:
 - a. Spouse and parents of spouse;
 - b. Children, including adopted children; and,
 - c. Parents.

2. **A serious health condition of the employee that makes the employee unable to perform the functions of the position of such employee.**

Therefore, pursuant to the AFGE Master Agreement, Article 35, Section 16(B)(2), I was entitled to 12 weeks of a LWOP for a serious health condition **regardless whether or not I worked at the VA for 12 months.**

Please, also notice the AFGE Master Agreement, Article 35, Section 16 - Family and Medical Leave Act (FMLA) (**ER 03748 Vol. 3, page 874**),

“I. The Department **shall** inform its employees **of their entitlements** and responsibilities under FMLA, including the requirements and obligations of employees.”

Therefore, I am respectfully asking the Court to take a judicial notice of the following **material facts** of the case.

Material fact No. 1.

On May 17, 2017, Mr. Johnson gave me an OPM 71 form and asked me to request a leave Without Pay (a LWOP.) I followed instructions, and I requested a Leave Without Pay (a LWOP), see (**ER 03748 Vol. 1, page 287.**)

<input checked="" type="checkbox"/> Leave Without Pay	05.18.17 - 07.07.17		required by
6. Remarks: To solve my health issues in Russia.			

Please, notice that I didn't write "In-Vitro Fertilization" in my OPM 71 form, and I wrote "To solve my health issues in Russia." I did it because I didn't know who would read the form, and I was thinking about my privacy.

Material fact No. 2.

Dr. Prince denied my Request for a LROP on May 19, 2017.

See (**ER 03748 Vol. 1, page 287.**)

8d. Date
5-19-2017

Material fact No. 3.

Dr. Prince did not identify **even one reason** for the denial of my Request for a LWOP in violation of the OPM 71 form that specifically said, **"If disapproved, give reason.** If annual leave, initiate action to reschedule."

See (ER 03748 Vol. 1, page 287.)

(If disapproved, give reason. If annual leave, initiate action to reschedule.)

8b. Reason for Disapproval:

Material fact No. 4.

Ms. Dunkelbeger mailed a letter to my home postal address in Albuquerque, NM on June 12, 2017 which was **outside** of the **five business day** mandatory period that was imposed by 29 CFR § 825.300(b)(1.) See (ER 03748 Vol. 1, 290.)

Read 29 CFR § 825.300(b),

(1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave **within five business days**, absent extenuating circumstances."

U.S. Postal Service TM	
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(Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
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Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	
Send To: Tatyana Drevalova	
Street, Apt. No., or PO Box No. 431 Alcazar St NE	
City, State, ZIP+4 ABQ, NM 87108	

Material fact No. 5. Ms. Dunkelberger mailed this letter to my home postal address in Albuquerque, NM while knowing that I would not receive this letter because at that time I was in Russia. This letter was unclaimed, and it was returned back to the Agency. See (ER 03748 Vol. 1, page 291.)

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Page 1 of 4

USPS Tracking® ResultsFAQs (<http://faq.usps.com/?articleId=220900>)**Track Another Package +**

Remove

Tracking Number: 70141200000081360083**In-Transit****Product & Tracking Information****See Available Actions****Postal Product:****Features:**
Certified Mail™

DATE & TIME	STATUS OF ITEM	LOCATION
June 13, 2017, 11:12 am	Notice Left (No Authorized Recipient Available)	ALBUQUERQUE, NM 87108

We attempted to deliver your item at 11:12 am on June 13, 2017 in ALBUQUERQUE, NM 87108 and a notice was left because an authorized recipient was not available. You may arrange redelivery by using the Schedule a Redelivery feature on this page or may pick up the item at the Post Office indicated on the notice beginning June 14, 2017. If this item is unclaimed by June 28, 2017 then it will be returned to sender.

June 13, 2017, 2:52 am	Departed USPS Facility	ALBUQUERQUE, NM 87101
June 12, 2017, 9:01 pm	Arrived at USPS Facility	ALBUQUERQUE, NM 87101

<https://tools.usps.com/go/TrackConfirmAction?tRef=fullpage&tLc=2&text28777=&tLabe...> 6/21/2017**000172**

Material fact No. 6. The Agency **never emailed** me Dr. Prince's denial of my Request for a LWOP. Read Ms. Cormier's October 09, 2018 Proposed Order to the Motion to Dismiss my Original June 25, 2018 Complaint No. 3:18-cv-03748-JCS (**ER 03748 Vol. 2, page 414, lines 16-17**), "Meanwhile, plaintiff's request for leave without pay had been denied and a letter to that effect was sent to her mailing address, **but not emailed to her.**"

Material fact No. 7. On June 30, 2017, the Agency terminated my employment (**ER 03748 Vol. 1, pages 293-294.**) In its Termination Letter, the Agency **did not notify me** that my Request for a LWOP had been denied. See (**ER 03748 Vol. 1, pages 293.**)

2. The Associate Director, Patient Care Services, has recommended that you be terminated from your position for failure to qualify during your probationary period. Your termination is due to attendance issues.

3. The effective date of your termination will be June 30, 2017. The decision to terminate you immediately in lieu of a two (2) week notice is due to your absent without leave (AWOL) status since May 21, 2017. You must properly clear the facility, turn in any government property to your supervisor and clear any indebtedness prior to the release of your final paycheck.

Material fact No. 8. I learned the first time that Dr. Prince denied my Request for a LWOP only during the Mediation with Ms. Dunkelberger on **September 07, 2017.**

Also, I am asking the Court to take a Judicial Notice of the following statute.

5 CFR § 630.1208 - Medical certification.

"(a) An agency **may** require that a request for leave under § 630.1203(a) (3) or (4) be supported by written medical certification issued by the health care provider of the employee or the health care provider of the spouse, son, daughter, or parent of the employee, as appropriate. An agency **may waive the requirement for an initial medical certificate** in a subsequent 12-month period if the leave under § 630.1203(a) (3) or (4) is for the same chronic or continuing condition.

(b) The written medical certification shall include -

(1) The date the serious health condition commenced;

(2) The probable duration of the serious health condition or specify that the serious health condition is a chronic or continuing condition with an unknown duration and whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity;

(3) The appropriate medical facts within the knowledge of the health care provider regarding the serious health condition, including a general statement as to the incapacitation, examination, or treatment that may be required by a health care provider;

(4) For the purpose of leave taken under § 630.1203(a)(3) of this part -

(i) A statement from the health care provider that the spouse, son, daughter, or parent of the employee requires psychological comfort and/or physical care; needs assistance for basic medical, hygienic, nutritional, safety, or transportation needs or in making arrangements to meet such needs; and would benefit from the employee's care or presence; and

(ii) A statement from the employee on the care he or she will provide and an estimate of the amount of time needed to care for his or her spouse, son, daughter, or parent;

(5) For the purpose of leave taken under § 630.1203(a)(4), a statement that the employee is unable to perform one or more of the essential functions of his or her position or requires medical treatment for a serious health condition, based on written information provided by the agency on the essential functions of the employee's position or, if not provided, discussion with the employee about the essential functions of his or her position; and

(6) In the case of certification for intermittent leave or leave on a reduced leave schedule under § 630.1203(a) (3) or (4) for planned medical treatment, the dates (actual or estimates) on which such treatment is expected to be given, the duration of such treatment, and the period of recovery, if any, or specify that the serious health condition is a chronic or continuing condition with an unknown duration

1 and whether the patient is presently incapacitated and the likely duration and
2 frequency of episodes of incapacity.

3 (c) The information on the medical certification shall relate only to the serious health
4 condition for which the current need for family and medical leave exists. The agency may not
5 require any personal or confidential information in the written medical certification other than
6 that required by paragraph (b) of this section. If an employee submits a completed medical
7 certification signed by the health care provider, the agency may not request new information
8 from the health care provider. However, a health care provider representing the agency,
9 including a health care provider employed by the agency or under administrative oversight of the
10 agency, may contact the health care provider who completed the medical certification, with the
11 employee's permission, for purposes of clarifying the medical certification.

12 (d) If the agency doubts the validity of the original certification provided under paragraph
13 (a) of this section, the agency may require, at the agency's expense, that the employee obtain the
14 opinion of a second health care provider designated or approved by the agency concerning the
15 information certified under paragraph (b) of this section. Any health care provider designated or
16 approved by the agency shall not be employed by the agency or be under the administrative
17 oversight of the agency on a regular basis unless the agency is located in an area where access to
18 health care is extremely limited - e.g., a rural area or an overseas location where no more than
19 one or two health care providers practice in the relevant specialty, or the only health care
20 providers available are employed by the agency.

21 (e) If the opinion of the second health care provider differs from the original certification
22 provided under paragraph (a) of this section, the agency may require, at the agency's expense,
23 that the employee obtain the opinion of a third health care provider designated or approved
24 jointly by the agency and the employee concerning the information certified under paragraph (b)
25 of this section. The opinion of the third health care provider shall be binding on the agency and
26 the employee.

27 (f) To remain entitled to family and medical leave under § 630.1203(a) (3) or (4) of this
28 part, an employee or the employee's spouse, son, daughter, or parent must comply with any

1 requirement from an agency that he or she submit to examination (though not treatment) to
 2 obtain a second or third medical certification from a health care provider other than the
 3 individual's health care provider.

4 (g) If the employee is unable to provide the requested medical certification before leave
 5 begins, or if the agency questions the validity of the original certification provided by the
 6 employee and the medical treatment requires the leave to begin, the agency **shall** grant
 7 **provisional leave pending final written medical certification.**

8 (h) An employee must provide the written medical certification required by paragraphs
 9 (a), (d), (e), and (g) of this section, signed by the health care provider, no later than 15 calendar
 10 days after the date the agency requests such medical certification. If it is not practicable under
 11 the particular circumstances to provide the requested medical certification no later than 15
 12 calendar days after the date requested by the agency despite the employee's diligent, good faith
 13 efforts, the employee must provide the medical certification within a reasonable period of time
 14 under the circumstances involved, but no later than 30 calendar days after the date the agency
 15 requests such medical certification.

16 (i) **If, after the leave has commenced,** the employee fails to provide the requested
 17 medical certification, the agency may -

18 (1) **Charge the employee as absent without leave (AWOL);** or

19 (2) **Allow the employee to request that the provisional leave be charged as**
 20 **leave without pay or charged to the employee's annual and/or sick leave**
 21 **account, as appropriate.**

22 (j) **At its own expense, an agency may require subsequent medical recertification on**
 23 **a periodic basis,** but not more than once every 30 calendar days, for leave taken for purposes
 24 relating to pregnancy, chronic conditions, or long-term conditions, as these terms are used in the
 25 definition of serious health condition in § 630.1202. For leave taken for all other serious health
 26 conditions and including leave taken on an intermittent or reduced leave schedule, if the health
 27 care provider has specified on the medical certification a minimum duration of the period of
 28 incapacity, the agency may not request recertification until that period has passed. An agency

may require subsequent medical recertification more frequently than every 30 calendar days, or more frequently than the minimum duration of the period of incapacity specified on the medical certification, if the employee requests that the original leave period be extended, the circumstances described in the original medical certification have changed significantly, or the agency receives information that casts doubt upon the continuing validity of the medical certification.

(k) To ensure the security and confidentiality of any written medical certification under § 630.1208 or 630.1210(h) of this part, the medical certification is subject to the provisions for safeguarding information about individuals under subpart A of part 293 of this chapter.

[58 FR 39602, July 23, 1993, as amended at 61 FR 64453, Dec. 5, 1996; 65 FR 26487, May 8, 2000; 65 FR 38409, June 21, 2000. Redesignated and amended at 76 FR 60704, 60705, Sept. 30, 2011]”

Therefore, I am respectfully asking the Court to judicially notice that, pursuant to 5 CFR § 630.1208:

1) It was **IMMATERIAL**:

a) Whether or not I provided my medical certification **whatsoever** before taking a 2017 trip to Russia. See 5 CFR § 630.1208(a), “An agency **may** require that a request for leave under § 630.1203(a) (3) or (4) be supported by written medical certification issued by the health care provider of the employee...” Please, notice that the plain language of the statute has a word “**may**” which is **permissive** and not mandatory. Please, notice that the plain language of 5 CFR § 630.1208(a) doesn’t contain a mandatory word “shall.” Please, also notice that the plain language of 5 CFR § 630.1208(a) says, “An agency **may waive the requirement for an initial medical certificate.**” Therefore, pursuant to 5 CFR § 630.1208(a), I **did not** have a mandatory obligation to provide my medical certification to Ms. Dunkelberger prior to taking my 2017 trip to Russia.

- b) Whether or not I provided my medical certification **on Russian or on English** language prior or after my 2017 trip to Russia. Please, see 5 CFR § 630.1208(d), “If the agency doubts the validity of the original certification provided under paragraph (a) of this section, the agency may require, at the agency's expense, that the employee obtain the opinion of a second health care provider designated or approved by the agency concerning the information certified under paragraph (b) of this section.” Please, notice that Defendants confirmed in their June 04, 2021 Answer that I authorized Ms. Das to preliminary translate my medical document from Russian into English, see page 5, lines 8-9, “Defendants admit that Plaintiff asked and gave consent to Ms. Das to translate a document from Russian to English.”
- c) **Whether or not** Ms. Dunkelberger, Mr. Johnson, Dr. Prince, or whoever else **approved** my Request for a Leave (any kind of a leave, not necessarily a Leave Without Pay) prior to my 2017 trip to Russia. See 5 CFR § 630.1208(g), “If the employee is unable to provide the requested medical certification before leave begins, or if the agency questions the validity of the original certification provided by the employee and the medical treatment requires the leave to begin, the agency shall grant provisional leave pending final written medical certification.” Please, notice that the plain language of 5 CFR § 630.1208(g) imposes **a mandatory obligation** (the word “**shall**”) on the Agency to grant me with a **provisional leave** pending final written medical certification. Please, notice that Defendants failed to follow **a mandatory obligation** to provide me with a provisional leave pending final written medical certification.
- 2) Defendants **didn't have any right** to place me on the Absent Without Leave (the AWOL) status starting **May 21, 2017**. See 5 CFR § 630.1208,

“(i) **If, after the leave has commenced**, the employee fails to provide the requested medical certification, the agency **may**² -

(1) **Charge the employee as absent without leave (AWOL)**; or

(2) **Allow the employee to request that the provisional leave be charged as leave without pay or charged to the employee's annual and/or sick leave account, as appropriate.**”

Therefore, the Agency had a mandatory obligation **to wait until I return back from Russia** and **afterwards** to do either:

- 1) To charge me with an AWOL
- 2) To allow me to apply for any kind of a paid leave (Advanced Sick Leave, Advanced Annual Leave, Voluntary Leave Transfer Program, etc.)

In fact, the Agency placed me on the **AWOL** status starting **May 21, 2017** (ER 03748 Vol. 1, pages 297-299) in violation of 5 CFR § 630.1208(i) and subsequently fired me (ER 03748 Vol. 1, pages 293-294) without giving me a Notice and an opportunity to be heard.

DRISVALEVA, TATYANA E T&L 221 Telework Ind: None [REDACTED]

Date	TW	Scheduled Tour	Tour Exceptions
Sun 14-May-17		07:30P-08:00A	
Mon 15-May-17		07:30P-08:00A	
Tue 16-May-17		07:30P-08:00A	
Wed 17-May-17		11:30P-08:00A	
Thu 18-May-17		Day Off	
Fri 19-May-17		Day Off	
Sat 20-May-17		Day Off	
Sun 21-May-17		07:30P-08:00A	07:30P-08:00A WP LWOP AWOL
INAPPROPRIATE LEAVE REQUEST			
Mon 22-May-17		07:30P-08:00A	07:30P-08:00A WP LWOP AWOL
INAPPROPRIATE LEAVE REQUEST			
Tue 23-May-17		07:30P-08:00A	07:30P-08:00A WP LWOP AWOL
INAPPROPRIATE LEAVE REQUEST			
Wed 24-May-17		Day Off	
Thu 25-May-17		Day Off	
Fri 26-May-17		Day Off	
Sat 27-May-17		Day Off	

² Permissive, **not** mandatory.

Conclusion.

I am respectfully asking the Court to strike Zack's June 04, 2021 Answer in its entirety because it is unsworn and violates 28 U.S.C. § 1746. I am also asking to strike Zack's June 04, 2021 Answer because it is in its entirety because it violates the F.R.C.P. Rule 11(b.) The June 04, 2021 Answer is hearsay that is not supposed to be reviewed at all. As an alternative, I am asking the Court to partially strike Zack's June 04, 2021 Answer for the reasons specified above and below.

Specifically, I am respectfully asking to strike Zack's statements that:

- 1) **That I was not entitled for an FMLA** leave because **I didn't work at the VA for 12 months** because it is immaterial, see the AFGE Master Agreement, Article 35, Section 16 - Family and Medical Leave Act (FMLA), Subdivision (B)(2.) Pursuant to the FMLA and the AFGE Master Agreement, I was entitled to 12 weeks of an unpaid leave per year **for a serious health condition** regardless **whether or not I worked at the VAMC for 12 months.**
- 2) That I didn't submit my medical certification **at all** prior on May 17, 2017 together with my OPM 71 form because it is immaterial, see 5 CFR § 630.1208(a) and the 42 U.S.C. § **12112(d)(4)(A)'s medical inquiry prohibition.** *Taylor v. City of Shreveport*, 798 F.3d 276,283 (5th Cir. 2015).
- 3) That I didn't submit my medical certification **on English language** prior to my May 18, 2017 trip to Russia because it is immaterial, see 5 CFR § 630.1208(d)
- 4) That **on May 19, 2017 Dr. Prince disapproved my Request for a LWOP** because it is immaterial, see 5 CFR § 630.1208(g) (a mandatory obligation to give me a provisional leave pending the final medical certification.)

I declare under the penalty of perjury and under the Federal laws that all foregoing is true and correct. Executed at San Francisco, CA on June 19, 2021.

Respectfully submitted,

s/ Tatyana Drevaleva



Plaintiff Pro Se

June 19, 2021.